

ORIGINAL

(S E R V E D)
(November 29, 1999)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

November 29, 1999

DOCKET NO. 99-17

**IMEX SHIPPING INC.-POSSIBLE VIOLATIONS OF
SECTIONS 10(a)(1) AND 10(b)(1) OF THE SHIPPING ACT OF 1984**

**PROPOSED SETTLEMENT APPROVED
AND INVESTIGATION DISCONTINUED**

Respondent Imex Shipping Inc. ("Imex" or "respondent") and the Bureau of Enforcement ("BOE") submitted a joint memorandum in support of a proposed settlement of this proceeding. The parties believe that the proposed settlement meets the Federal Maritime Commission's ("Commission") criteria for approval of agreements resolving administrative enforcement claims and, therefore, should be approved.

Introduction

By Order of Investigation dated August 19, 1999, the Commission commenced an investigation to determine: 1) whether Imex violated section 1 O(a)(1) of the Shipping Act of 1984 (“1984 Act”), 46 U.S.C. app. § 1709(a)(1), by knowingly and willfully obtaining transportation from the ocean common carrier at less than the rates and charges otherwise applicable through the receipt of unlawful rebates; 2) whether Imex violated section 10(b)(1) of the 1984 Act, 46 U.S.C. app. § 1709(b)(1), by charging, demanding, collecting or receiving less or different compensation for the transportation of property than the rates and charges shown in its tariff; 3) whether, in the event violations of sections 10(a)(1) and 10(b)(1) of the 1984 Act are found, civil penalties should be assessed against Imex and, if so, the amount of the penalties to be assessed; 4) whether, in the event violations of sections 1 O(a)(1) and 10(b)(1) of the 1984 Act are found, the tariff of Imex should be suspended; 5) whether the Ocean Transportation Intermediary license of Imex should be suspended or revoked pursuant to section 19 of the 1984 Act, 46 U.S.C. app. § 1718; and 6) whether, in the event violations are found, an appropriate cease and desist order should be issued.

BOE avers that at the evidentiary hearings it would introduce evidence in support of the allegations set forth in the Order of Investigation. Specifically, BOE asserts that it would show that, from September 1996 through April 1998, Tmex received rebates from a vessel-operating common carrier in the trade between the United States and South America. The rebate arrangement allowed Imex to be charged rates lower than the applicable service contract rates for Imex’s shipments transported between various ports and points in the United States and South America. It appears that Imex initially paid the applicable service contract rates, but later received a refund for the difference between the service contract rates and the agreed upon rates. According to the documents provided

to the Commission, it appears that Imex's malfeasance extends to the movement of over 100 shipments. Finally, BOE asserts that it would show that, between June 19, 1997 and March 10, 1998, Imex, in its capacity as a non-vessel-operating common carrier ("NVOCC"), transported shipments under its own bills of lading wherein it assessed and collected rates which appear to bear no relation to the rates set forth in Imex's tariff then on file in the Commission's Automated Tariff and Filing Information System ("ATFI").

Respondent and BOE believe that it is in the best interests of the parties and the shipping public to resolve the above-referenced proceeding rather than engage in litigation.

The attached settlement agreement is the result of negotiations between counsel for respondent and BOE and reflects each party's view of the case and its fair resolution. Upon approval of the proposed settlement by the presiding Administrative Law Judge and the Commission, the parties seek dismissal of Docket No. 99-17.

Authority for Settlement

The Administrative Procedure Act ("APA"), 5 U.S.C. § 554(c)(1), requires agencies to give interested parties an opportunity, *inter alia*, to submit offers of settlement "when time, the nature of the proceeding, and the public interest permit." As the legislative history of the APA makes clear, Congress intended this particular provision to be read broadly so as to encourage the use of settlement in proceedings such as the present one:

. . . even where formal hearing and decision procedures are available to parties, the agencies and the parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal

procedures constitute the vast bulk of administrative adjudication. . . . The statutory recognition of such informal methods should strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations.

Senate Committee on the Judiciary, Administrative Procedure Act-Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1946).

Courts have endorsed the use of the APA settlement provision “to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.” *Pennsylvania Gas and Water v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972).

The Commission itself has long recognized that the law strongly favors settlements:

. . . the law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts and it is thus advantageous to judicial administration, and, in turn, to government as a whole.

Old Ben Coal Company v. Sea-Land Service, Inc., 21 F.M.C. 506,512 (1978), 18 S.R.R. 1085, 1092 (Initial Decision, 1978; administratively final November 29, 1978). See also *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 365,368-g (1979), 19 S.R.R. 1037, 1039 (Initial Decision, 1979; administratively final December 27, 1979); and *Behring International Inc.* (Initial Decision, March 17, 1981; administratively final June 30, 1981), 20 S.R.R. 1025, 1032-33.

Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.91, codifies the *Old Ben Coal* holding in language borrowed in part from the APA, 5 U.S.C. § 554(c)(1). In accordance with Rule 91 and its policy favoring settlements, the Commission has approved settlements of administrative and investigative proceedings. *Eastern Forwarding International, Inc.* (Initial Decision, July 30, 1980; administratively final September 8, 1980), 20 S.R.R. 283, 286 ("*Eastern*"); *Far Eastern Shipping Co.* (Initial Decision, March 25, 1982; administratively final, May 7, 1982), 21 S.R.R. 743, 764 ("*FESCO*"); *Armada Great Lakes/East Africa Service, Ltd.* (Initial Decision, March 21, 1986; administratively final April 25, 1986), 23 S.R.R. 946, 949 ("*Armada*"); *TWRA-Possible Violations of the Shipping Act of 1984* (Initial Decision, August 27, 1986; administratively final October 9, 1986), 23 S.R.R. 1329, 1340 ("*TWRA*"); and *Royal Caribbean Cruises Ltd. Possible Violations of Certification Requirements* (Order Approving Settlement and Discontinuing Proceeding, December 4, 1991), 26 S.R.R. 64 ("*Royal Caribbean*").

The Commission's regulations recognize the designated role of BOE in formal proceedings and, necessarily, in the settlement of those proceedings. 46 C.F.R. §§ 502.42 and 502.61. The regulations also require that the Presiding Judge approve all such settlement agreements in formal proceedings. 46 C.F.R. § 502.603(a).

Criteria for Approval of Settlement

To discharge the duty imposed by 46 C.F.R. § 502.603(a), the Presiding Judge must decide whether the proposed settlement satisfies appropriate criteria for approval. Among the criteria to be considered in evaluating settlement offers are the Commission's enforcement policy, litigative probabilities and litigative and administrative costs.

A summary of the Commission's view of the relationship between the criteria for assessment of penalties and the criteria for approving settlements appears in the initial decision in *Armada*:

As seen, Section 13(c) of the 1984 Act and §505.3 of the Commission's regulations, which implements both Section 13 of the 1984 Act and Section 32 of the 1916 Act, explicitly set forth criteria for assessment of penalties, and while they do not directly address the criteria for settlement of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission. Section 32(e) of the 1916 Act was enacted in 1977. [Footnote omitted.] The rules and regulations implementing Section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR § 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105." . . . Those standards, particularly, the standards enumerated in 4 CFR § 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to Section 32(e). More to the point, it was held that those standards provided criteria for both settlements and assessments. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." [citing *Eastern* and *Behrznng International, Inc.*, *supra*.]

Armada, *supra*, 23 S.R.R. at 956. See also *Marcella Shipping Co. Ltd.* (Initial Decision, February 13, 1986; administratively final March 26, 1986), 23 S.R.R. 857, 866.

The appropriate standards for approving proposed settlements in assessment proceedings were summarized in *FESCO* as follows:

. . . settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise . . . may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, *i.e.*, the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [Footnotes omitted.]

FESCO, supra, 21 S.R.R. at 759.

The Commission has reaffirmed that potential costs and uncertainties of success are valid factors to be considered both in negotiation of settlement and in view of a settlement agreement. *Investigation of Unfiled Agreements-Yangming Marine Transport, et al.* (Order Adopting Initial Decision, March 30, 1988), 24 S.R.R. 910 (“*Yangming*”). See also *Royal Caribbean, supra*.

In line with the Commission’s analysis as enunciated in *FESCO, Eastern, Armada, Yangming*, and *Royal Caribbean, supra*, proposed settlements are to be evaluated on the basis of balancing agency enforcement policy of deterrence by respondent, the industry and the general public with the litigative probabilities, litigative and administrative costs and such other matters as justice may require. That balance clearly favors approval of this proposed settlement.

With respect to the policy of enforcement, BOE stresses the importance of ensuring compliance by all regulated entities with the Shipping Acts and the Commission’s regulations. Respondent supports the Commission’s objective and has agreed to take appropriate measures in order to eliminate the practices by respondent which are the basis for the alleged violations described earlier. Accordingly, the parties submit that the proposed settlement agreement will further the Commission’s enforcement policy.

As noted above, there are bona fide disagreements between Respondent and BOE as to certain facts and legal issues pertaining to this matter. Although each party is confident it would prevail, the outcome of any litigation is uncertain. In view of the litigative probabilities, the parties seek a settlement of this proceeding. Inasmuch as this proceeding could be complicated, time consuming, and costly, the proposed settlement would save all parties time and expense. Therefore,

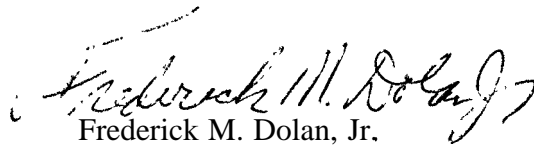
it is abundantly clear that the litigative probabilities and potential litigative and administrative costs of this proceeding favor approval of this proposed settlement agreement.

Conclusion

The proposed settlement agreement comprehensively addresses the issues relating to the above-referenced proceeding and meets the Commission's well established criteria for approval of agreements settling administrative enforcement claims and, therefore, will be approved and Docket No. 99-17 will be discontinued in its entirety.

IT IS ORDERED:

The attached settlement agreement is approved and the investigation is discontinued.


Frederick M. Dolan, Jr.
Administrative Law Judge

BEFORE THE
FEDERAL MARITIME COMMISSION

----- X
IMEX SHIPPING INC. - POSSIBLE .
VIOLATIONS OF SECTIONS 10(a)(1) AND :
10(b)(1) OF THE SHIPPING ACT OF 1984 :
----- X

DOCKET NO.
99-17

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the "Agreement") is entered into between:

- 1) the Federal Maritime Commission's ("Commission") Bureau of Enforcement ("BOE"),
- and
- 2) Imex Shipping Inc. ("Imex" or "Respondent"), the Respondent in Docket No. 99-17.

WHEREAS, the Commission believes that:

1. Imex violated section 10(a)(1) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1709(a)(1), by knowingly and willfully obtaining transportation for property at less than the rates or charges otherwise applicable by the unjust or unfair device or means of receiving rebates from a vessel-operating common carrier ("VOCC") on shipments transported between various ports and points in the United States and South America;

and the Commission further believes that,

2. Imex violated section 10(b)(1) of the 1984 Act, 46 U.S.C. app. § 1709(b)(1), by charging, collecting or receiving greater, less or different compensation for the transportation of property than the rates and charges set forth in its tariff.

WHEREAS, the Commission has acted on said beliefs by instituting FMC Docket No. 99-17 entitled *Imex Shipping Inc. - Possible Violations of Sections 1 O(a)(1) and 1 O(b)(1) of the Shipping Act of 1984*, to which Imex was named the Respondent;

WHEREAS, in addition to the aforementioned allegations, Imex has made disclosure of certain information of transportation activity in possible violation of the 1984 Act;

WHEREAS, Respondent has terminated the practices which are the basis for the disclosed or alleged violations set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate such practices by Respondent in the future;

WHEREAS, Respondent does not admit that it has violated any provisions of the Shipping Act of 1984;

WHEREAS, the Bureau of Enforcement and Respondent believe it is in the best interests of the parties and the shipping public to resolve the above referenced proceedings rather than engage in costly litigation.

NOW, THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the alleged violations set forth and described herein, Respondent and the Commission's Bureau of Enforcement hereby agree upon the following terms of settlement:

1. Within five (5) days after a decision of the Administrative Law Judge or the Commission approving this Agreement becomes administratively final, Respondent

shall make monetary payment to the Commission, by cashiers or certified check, in the total amount of \$55,000 (Fifty-Five Thousand Dollars).

2. Upon approval of the terms set forth in this Agreement by the Administrative Law Judge and the Commission, this instrument shall forever bar the commencement or institution by the Commission of any civil penalty assessment proceeding or other claim for recover of civil penalties against Respondent for the alleged violations of the Shipping Act of 1984 set forth in FMC Docket No. 99-17 or disclosed by Respondent.
3. This Agreement is subject to approval by the Commission in accordance with 46 C.F.R. § 502.603.

ON BEHALF OF RESPONDENT

By: /s/ Henry Gonzalez
Title: Attorney
Date: 11-17-99

ON BEHALF OF THE FEDERAL MARITIME COMMISSION

By: /s/ Vem W. Hill
Vem W. Hill, Director
Bureau of Enforcement

Date: 11-18-99